REA LAW JOURNAL

DEPARTMENT OF AGRICULTURE RURAL ELECTRIFICATION ADMINISTRATION

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MEMBERS OF COOPERATIVES, HOLDING POSITIONS IN THE POSTAL SERVICE, SERVING AS DIRECTORS

Members of REA cooperatives who are employed in the Postal Service, mindful of the many laws and regulations restricting their activities, have inquired about the legality or the propriety of their serving as directors of the cooperative. Service in such a capacity, they feel, might violate some law, regulation or policy governing the conduct of employees. This is true, particularly in regard to rural carriers, subject as they are to more stringent and more detailed regulations than other postal employees. Familiar in a general way with laws and regulations prohibiting certain outside activities such as engaging in business, running for office or receiving compensation from other sources, postal employees have entertained doubts as to their right to be elected to the board of directors, and to accept the usual fee and mileage compensation paid to directors. In view of the many rules and regulations, such doubts are not without reason; they are, however, without basis in law or fact, as will be shown by an examination of the applicable statutes, regulations, and policies affecting the postal service.

Persons holding positions in the Post Office Department are subject to provisions of the United States Code applicable to government employees, and to the Postal Service; to the Civil Service Rules and Regulations; and to the regulations and policies of the Department. All of these statutes, regulations, etc. have been collected and codified in the Postal Laws and Regulations (Supt. of Documents, 1932). In this codification, no statute or regulation of the Civil Service Commission had any relevancy or bearing on the present question. Recent amendments were likewise of no help in finding the answer. In Section 39 of Title I of the P. L. & R. a postal regulation prohibits election to offices such as notary public, commissioner of deeds, member of a school board, or director of a State or Municipal authority. This prohibition, of course, is directed against election to public or political office, and is clearly not applicable to the office of director of a cooperative. Section 39 is discussed here only because it is the section of the P.L. & R. most nearly related to the present question. The prohibition contained therein, once applicable only to postal employees, is now, by virtue of the Hatch Act (18 U.S.C.A. 61 et seq.) applicable to all government employees. (See Civil Service Form 1236)

A special section of the P. L. & R. is devoted to the activities of rural mail carriers. This class of employees is subject to a great many rules, regulations, and restrictions, filling in 27 pages of the volume, and prohibiting such activities as soliciting subscriptions for publishers, carrying passengers in vehicles, advertising products, etc. No mention is made of any activity identical with or resembling service as a director. A prohibition which may have been the occasion of some rural carrier's

doubts is found in Sec. 1002 (3):

> "Rural carriers shall not engage in any business while on or off duty which offers temptation to solicit patronage on their routes or in which their official position would give them special advantage over competitors."

No prohibition against serving as a director has found expression in the laws and regulations governing the postal service, and if such prohibition obtains, it must be found in the administrative policy of the Department.

Postmasters and postal employees have served on boards of directors of private corporations, and the Post Office Department has not objected as long as such service did not interfere with the proper performance of postal duties or involve them in any controversy. The objective sought by the departmental restrictions on outside activities is to keep employees not only out of political activity but also out of controversies, campaigns or issues which might involve the Post Office Department. More specifically, the Department does not permit its employees to engage in contests or controversies with the patrons of the service. In view of its previous acquiescence to service by its employees on boards of directors, the Post Office Department is not likely to interfere with a postmaster or rural carrier who serves as a director of an REA cooperative. Since the Department does not render opinions in hypothetical cases, an official ruling can be had only by presentation of an actual case. In regard to the present question, a rural carrier who is a member of a cooperative could request his postmaster to write to the Department for a ruling. There is no reason at all to doubt that members of REA cooperatives who are in the postal service may serve as directors and receive the usual fees and mileage compensation.

Thomas J. Murray
Assistant Counsel

RECENT CASES

Contracts - Power of courts to change utility rates when basis for franchise contract has been altered

In April, 1935, defendant utility company entered into a franchise contract with the City of Toledo under which rates to be charged for electricity were fixed for a period of five years based upon expenses of operation and a fair return on its investment. One of the items represented as part of the expense was an excise tax to the State of Ohio of one percent on gross sales. In April, 1937, the tax expired and was not renewed by the state until January, 1938, and then for only sixty-five hundredths of one percent.

Plaintiff sued as a consumer to require defendant to account for the alleged overcharge collected by it and to enjoin the collection of such money in the future. Held, judgment for defendant. Selznick v. Toledo Edison Co., 28 N.E.(2d) 682 (Ohio, 1939).

Adopting the view that such contracts "are governed by the same principles as applied to contracts between individuals", the court expressed its inability to interfere with the vested rights of the parties simply because changing conditions made the contract more favorable to one of them. The court also rejected the contention that either fraud or mutual mistake of fact had entered into the making of the contract and went on to state:

"But assuming one or more of these infirmities were present, the courts would lack the power to revise the contract for the parties, that is a legislative, not a judicial function. All the courts could do would be to declare the contract void and thereby clear the way for the parties to make a new contract, if they so desired. That is not the objective of this suit, but rather the court is asked, in effect, to set up a new rate schedule for the parties to the contract, a subject-matter over which the courts do not have jurisdiction."

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A review of that portion of the law important and interesting to attorneys working in the field of rural electrification.

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Address suggestions and contributions to the Editorial Office, REA, Room 206, 1518 "K" Street, Washington, D. C.

Mandamus by foreign cooperative to compel Commissioner of Corporations to accept articles of incorporation

Petitioner, a non-profit cooperative corporation, duly organized under the laws of Oregon, presented to the Massachusetts Commissioner of Corporations its charter, bylaws and certain financial papers together with the filing fee for the purpose of registering with the said Commissioner and appointing him as agent to receive service of process. The statute required that every foreign corporation having a usual place of business within the state should file certain papers with the Commissioner and appoint him as an attorney to receive service. Penalties were prescribed for non-compliance. The Commissioner refused to accept appointment as attorney to accept service of process giving as his reason the fact that the cooperative corporation, organized without capital stock, was not a foreign corporation within the meaning of the act since it could not comply with the requirement of filing its charter "setting forth the amount of capital stock." A petition for a writ of mandamus to compel the Commissioner to accept appointment as agent was denied. On appeal to the Supreme Judicial Court of Massachusetts, held, writ of mandamus to issue. Pacific Wool Growers v. Commissioner of Corporations & Taxation, 25 N.E.(2d) 208 (Mass. 1940).

The Commissioner argued that in view of prior legislation which required cooperative corporations organized under Massachusetts law to issue capital stock the legislature did not intend to include a non-stock corporation within the meaning of foreign corporation, and the provisions as to "amount of capital stock" limited registration to stock corporations. The court rejected the contentions as invalid holding that the language of the act was broad enough to include the type of corporation like the petitioner's, and that the requirement of filing the "amount of capital stock" need be complied with only when it had been authorized and issued. The court added that the important consideration was the purpose for which the foreign corporation had been established, and not the precise form or manner in which it had been organized.

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Municipal Corporations - Validity of a city's action in condemning part of an electric light plant to be used thereafter by the city

The Central Power Co. owned and operated water, gas, and electrical works in and about Nebraska City. The properties were interconnected and operated as a unit, the nucleus being situated in the City and the rest outside the City, some in other cities. The Commissioners of Nebraska City, its governing body, decided to acquire most of the power company's properties by condemnation for use thereafter as a plant owned and operated by the City. Accordingly, the Commissioners passed an ordinance to the effect that at a general primary election the question would be submitted to a vote of the people whether all the properties of the Power Company, except those in other cities, should be acquired by Nebraska City under its power of eminent domain. Before the ordinance went into effect, a sufficient number of the electorate petitioned, according to the referendum statute, that the Commissioners recon-

sider the ordinance and that if they were still decided that it be passed, that the ordinance be submitted to a referendum. The commissioners refused to submit the ordinance to a referendum on the ground that the people would have a chance to vote on the ordinance according to its very terms. More than a majority but less than 60% of the voters at the general primary election voted in favor of the ordinance. Plaintiff sought a preliminary injunction to suspend the condemnation proceedings instituted thereafter. Defendant did not contest this and plaintiff won a preliminary injunction. Plaintiff now seeks to render the injunction permanent on the grounds disposed of in the Appellate Court's opinion. From the order of the trial court dissolving the injunction, plaintiff appealed. Held, judgment affirmed. Central Power Co. v. Nebraska City, 112 Fed.(2d) 471 (C.C.A. 8, June 1940).

No referendum is necessary under the petition since the ordinance itself in effect provided for a referendum. There is no need to hold an election on the question whether there shall be an election. Also, a majority vote is sufficient for the passage of the ordinance, since the general primary is a general election, and by statute a majority vote at a general election is sufficient. Nor is the ordinance too vague in its provision that the City would condemn all the properties of the Power Company which the City could legally do, except those properties situated in other towns and villages. And no question of due process is raised by a taking of part and not all of the properties, since the Company will be compensated for the damages to the part left to it caused by the severance.

The most serious contention raised by plaintiff was that, under the statutes, if the City condemned any of the Company's properties it had to condemn all, even those situated in other cities. After an extended review of the Nebraska statutes, the court held that this contention was without merit; that the City could not be required (although it had the power) to buy up properties in other cities for its municipal plant, especially since it was by a divided court that the Supreme Court in Nebraska had decided that a city could, if it so desired, buy up utility properties in other cities. The court was aided in its conclusion by the statutes prohibiting a power district from buying and operating utility properties situated in other cities without the cities' consent.

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Negligence - Assumption of risk, the extent of the "rescuer doctrine"

Defendant power company maintained an energized electric wire on a wooden pole along the road in a rural area. A storm hurled the pole over the road blocking two-thirds of the road. The pole could be easily seen from a distance by travelers going down the road in one direction, but not from the other. Defendant's agent was notified that the line was down, but although he had sufficient opportunity to repair it, he did nothing. Plaintiff was a farm hand who worked at a place near the fallen line. He came upon the pole, and while seeking to remove it from the road he suffered severe electric shock. Plaintiff testified he did not know that the wire carried electricity. Plaintiff sued defendant on the ground of negligence and the latter defended solely on the ground of contributory negligence. Held, judgment for plaintiff. Wolfinger v. Shaw, 292 N.W. 731 (Nebraska, June 1940).

Plaintiff was not contributorily negligent as a matter of law, since a jury could find that a prudent man would have sought to remove the pole and would have done so in the same manner as did plaintiff. Especially is this so since plaintiff's action was taken to save third persons and their property from injury by coming into contact with the pole, the "rescuer doctrine" being applicable not only when there is an immediate impending injury to definite persons, but also where there is a situation which can reasonably give apprehension that there is danger to third persons (in this case, persons on the highway). Plaintiff

cannot be held, as a matter of law, to have assumed the risk of his injuries, since "the extent of the risk which a person is justified in taking increases in proportion to the increase of the danger and the value of the advantage that can be realized from encountering the danger and attempting to remove its hazards."

RECENT STATUTE

Legislature makes it a crime to remove identification number on electrical equipment

Act provides that it shall be a misdemeanor to deface any identification mark on any electrical equipment (including refrigerators, radios, etc.) when such property is encumbered with a mortgage, conditional sale, or other lien. Intent to defraud is an element of the crime. Ala. Act No. 667, Approved July 6, 1940.

LEGAL MEMORANDA RECEIVED IN OCTOBER

A-364 Commission jurisdiction over public utilities, and domestic and foreign cooperatives in Ky.

A-365 Extension of lines by N.C. cooperative into S.C.

A-366 Lease of transmission facilities to Bonneville Authority by REA cooperatives

A-372 Statement in Articles of Incorporation of number of directors to be elected - Pennsylvania

A-373 Filling newly created directorships by vote of directors - Pa.

A-383 Power of a municipality to purchase property subject to a mortgage, Nashville, Tenn.

A-385 Florida cooperative purchasing energy from a Georgia cooperative

REA LAW JOURNAL

DEPARTMENT OF AGRICULTURE — RURAL ELECTRIFICATION ADMINISTRATION

Vol. 2 No.11 — November, 1940 — Legal Division Addendum

TO ALL REA ATTORNEYS

On two recent field trips I found that there were many questions asked me with respect to work of other sections of the Legal Division which I was unable to answer and which in many instances involved matters that, somewhat to my embarrassment, I had not even heard of. If there were some clearing house for information by which the REA attorneys could be informed, at least in a general way, of special problems handled by other members of the Division I think the information obtained would be both interesting and beneficial, and I wonder if the REA Law Journal could not serve as such a clearing house. In connection with this suggestion I am submitting a brief report of a new development in which I participated and which may be of interest to members of the Legal Division:

The Indiana Statewide Rural Electric Cooperative, Inc., formerly Indiana Statewide Rural Electric Membership Corporation, has been reorganized and set up as a cooperative of cooperatives for the purpose of enabling the various distribution cooperatives in the State to work together in promoting their interests with respect to such matters as taxes, rates, legislation, certificates of convenience and necessity, utilization and account.

Under the reorganized set-up each cooperative organized under the laws of the State of Indiana and each foreign cooperative doing business in the State of Indiana is entitled to become a member of the Statewide. Each member cooperative is entitled to be represented on the board of directors. Most matters, however, will probably be handled by an operating committee of 9 members chosen from nine districts in the State, each of which districts has an approximately equal number of member cooperatives and consumers being served by REA lines. No schedule of fees or annual dues has as yet been determined, as the Statewide has sufficient funds left on hand from its prior activities, the most lucrative of which were engineering contracts, to carry it for an estimated period of six months.

The Administrator, who is to have the right to approve the employees of the Statewide and its accounting methods, has agreed that Statewide should operate with our approval for a trial period of six months to determine whether or not it can render service to the local cooperatives of sufficient value to warrant its continued existence. This is one of the few instances in which our cooperatives have formed a statewide association and the operation of this Statewide will be of interest in determining whether or not such organizations should be encouraged in other states.

Giles H. Penstone

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Editorial Note

In accordance with Mr. Penstone's inspired suggestion the REA Law Journal is inaugurating the experiment of attempting to act as a clearing house for the work of REA attorneys. To make your experience and knowledge available to the rest of the members of the staff please send summaries of all unusual occurrences to the Journal. The subject matter may include anything that will interest any other REA attorney. It may include experiences with State Regulatory Bodies, legislation, taxation, etc. Every field trip should yield a report. Don't wait until it gets cold--write it

up as soon as you get back. Note, also, that this forum is not limited to field trip subjects; consolidation, programs of conversions, etc., are all of interest and should be noted. Hereafter, when anything goes on that you feel the rest of the Legal Division might want to know about summarize it and send it on to the Journal.

LEGAL MEMORANDA RECEIVED IN OCTOBER

A-367 Power of REA to loan money to refrigeration cooperative for cold storage plant

A-368 Political contributions by Federal employees

A-354 Power of municipality to borrow funds to extend lines into rural areas - Okla. 26 Harmon

A-369 REA loan to an association engaged in billing consumers of electric energy

A-370 Sufficiency of notice of special meeting - Ala. 25 Bullock

A-371 Federal Power Commission jurisdiction over public utility supplying power to cooperative doing interstate business

A-374 Effect of filing a supplemental chattel mortgage where statute requires refiling original mortgage - S.C.

A-375 Copyright laws and publications of REA cooperatives

A-376 Counting a member represented by proxy as a "member present and voting" - Kentucky

A-377 Federal income tax lien on property conveyed to bona fide purchaser

A-378 Validity of mortgage where attestation of seal is omitted - Kan.

A-379 Power of a municipality to lease generating facilities owned by REA cooperative - Kansas

A-380 Enforceability of corporate contracts with persons aware of de facto nature of board of directors

A-381 Incorporation of statewide cooperatives - Ga., S.C., and Va.

A-382 Change of corporate name by Neb. Public Power District

A-384 Validity of provisions of loan contract delegating authority to Administrator over funds loaned by REA to cooperative (Ga. 93R Mitchell)

The Legal Division welcomes the following attorney to its staff:

Louis A. Roland

Columbia Law School; Legislative Editor of the Col. Law Review (1937); Legal Assistant to the Reporter for the Restatement of the Law of Security, American Law Institute (1937-38); private practice in N.Y.C. (1938-39); Review Attorney with NLRB (1939-40). Mr. Roland will be in the State Law Unit.